52685 110 I.A. 2nd 36

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. GEORGE FUNCHES, otherwise called GEORGE ELDORADO, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Thomas R. McMillan, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Two separate indictments were returned against the defendant. In one he was charged with sale of narcotics; to wit, heroin. In the other he was charged with possession of heroin. At his arraignment, the defendant, an indigent person represented by court-appointed counsel, pleaded not guilty to both indictments which were then consolidated for trial. After four jurors had been selected, the defendant filed and argued his motion to suppress $25.00 in marked currency and a quantity of heroin which had been seized by the police as a result of an allegedly illegal search of the accused's apartment in his presence. The prosecution contended at the hearing on this motion that: (1) there was probable cause to arrest the defendant since this case involves, in part, a controlled sale of narcotics conducted under close police surveillance; and (2) the accused consented to the search of his apartment in which the marked currency and heroin were found.

After witnesses had testified and a full hearing had been held, the trial court denied the defendant's motion to suppress and expressly found that the defendant had consented to the search of his apartment.

Defense counsel then informed the court that the accused wished to change his plea to both indictments from not guilty to guilty. The prosecution stated that it would reduce the

sale of narcotics charge to one of possession only. The court then questioned the defendant as to the voluntariness of his change in plea, advised him of his right to a jury trial and informed the accused of the range of punishment which could be imposed upon him by the court. The defendant persisted in his pleas of guilty to both charges of possession and did so plead in open court. The court found the defendant guilty of both charges of possession. Two judgments were entered and, after a hearing in aggravation and mitigation, the defendant was sentenced to two to three years in the State Penitentiary on each of the indictments in accordance with the earlier recommendation of the State. The sentences were to run concurrently. This was the first narcotics conviction for the defendant.

Within thirty days after entry of these final judgments, a Notice of Appeal was filed by the Public Defender of Cook County who also represented the defendant in the trial court. Subsequently, the Public Defender's Office filed, in this court, a petition for leave to withdraw as appellate counsel and, pursuant to the dictates of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), filed a brief in support of its petition in which brief it was stated that the record contained no legal points in favor of the defendant which were arguable on their merits. The record has also been filed in this court. No brief, other than the brief in support of its petition to withdraw as court-appointed appellate counsel, has been filed by the Public Defender in this court.

This court has written to the defendant in the State Penitentiary advising him of his appellate counsel's intention to withdraw from the appeal and enclosing a copy of the petition to withdraw and supporting brief. The defendant was given approximately seventy-five days in which to file any points he chose

which would support his appeal. This time has elapsed. No response has been received from the defendant. In accordance with Anders v. California, 386 U.S. 738 (1967), this court has now fully examined the trial court proceeding to determine whether the appeal is "wholly frivolous" or whether legal points are present which are "arguable on their merits" thereby requiring us to appoint another appellate advocate for this indigent defendant.

In accordance with Supreme Court Rule 608 (a), the common law record contains a transcript of the colloquy between the trial court and the defendant from the time defense counsel indicated his client wished to change his not guilty pleas to guilty to the time the court entered judgments on its findings. We have reviewed that transcript and are convinced that the pleas of guilty were freely, voluntarily and understandingly made by the defendant--a man of thirty-four and a high school graduate--and that the trial court properly met its duty under Ill. Rev. Stat. (1965), ch. 38, §115-2 (a) (2), of informing the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such guilty pleas. The defendant was advised of his right to a jury trial if he did not plead guilty. The accused persisted in his pleas and judgments were entered. These proceedings were properly conducted in accordance with the law. See People v. Davis, 33 Ill. 2d 134, 140, 210 N.E. 2d 530, 533 (1965).

The two indictments charging the defendant with sale and possession of narcotics were properly drawn in accordance with Ill. Rev. Stat. (1965), ch. 38, §111-3 (a). The defendant was properly advised of the names of the offenses; the statutory provisions of the Criminal Code which were violated; the nature and elements of the offenses; the county in which they were committed; and the name of the accused. His pleas of guilty were therefore

based upon valid indictments.

It is apparent from a reading of the record that this case is an example of "plea bargaining." Under our Criminal Code, the crimes of sale and possession of narcotics are both felonies. However, the possible punishments are quite different. The range of imprisonment for possession of narcotics, if this is the first offense, is at least two years and not more than ten years in the penitentiary. The range for sale of narcotics, if this is the first offense, is at least ten years and up to life imprisonment. See Ill. Rev. Stat. (1965), ch. 38, §22-40.

The defendant was initially faced with two indictments, one for sale and the other for possession. He was a first offender for narcotics crimes. Possible punishments varied greatly. After his motion to suppress incriminating evidence had been denied, the defendant successfully sought a reduction of the sale of narcotics indictment to the lesser included offense of possession in exchange for his guilty pleas. The prosecution recommended a sentence of two to three years on each indictment to run concurrently, and this was entered by the court. As was stated by the court in People v. Bowman, 40 Ill. 2d 116, 125, 239 N.E. 2d 433, 438 (1968):

> ". . . All persons knowledgeable in the area of criminal trial practice recognize, however, that many guilty pleas are the result of some form of 'bargaining', and that fact alone is not fatal to a conviction based upon such a negotiated plea. . . ."

We have made "a full examination of all the proceedings" in accordance with the dictates of Anders v. California, 386 U.S. 738 (1967). We conclude that the appeal is "wholly frivolous." Defendant's attorney is therefore given leave to withdraw and the judgments of conviction are affirmed.

JUDGMENTS AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

110 I.A. 2nd 31

52767

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LAWRENCE BUTLER, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JAMES A. GEROULIS Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Lawrence Butler, defendant, was indicted for the crime of unlawful sale of narcotic drugs. He was tried before the court without a jury, found guilty and sentenced to Illinois State Penitentiary for no less than 10 nor more than 15 years. No error is alleged with reference to the indictment. This appeal is taken from the judgment of the trial court.

In this court the defendant argues that he was not proved guilty beyond a reasonable doubt, and as a basis for that argument contends that the uncorroborated testimony of the narcotics informer was not clear and convincing, nor was it credible.

On May 17, 1967, at about 3:00 p.m., Floyd Flemister met Police Officers Pates and Tolbert and told them he could make a purchase of narcotics. The officers took him to the police station at 11th and State Streets, where he removed all of his clothing and was thoroughly searched. No narcotics were found on him. Flemister was then given $15.00 in marked bills, the serial numbers of which were recorded, and was driven by the police to the location at which he said he could make the purchase, 46th and Calumet. Flemister and Officer Pates then walked south on Calumet Avenue towards 47th Street, with Officer Pates half a block behind Flemister. At the corner of 47th and Prairie, Flemister met the defendant.

In his testimony Flemister stated that the defendant told him he had the narcotics and to follow him, while the defendant testified that he told Flemister he didn't know where to "cop"; that he had been off narcotics for two months. Nevertheless, the two men walked on Prairie Avenue to 48th Street, then west on 48th towards Indiana Avenue, when the defendant disappeared behind a building while Flemister remained in view of Officer Pates. A few minutes later the defendant came out of an alley, joined Flemister, and the two men again started walking together. In his testimony Flemister said that the defendant handed him a package when they were in the middle of the block, and that he in turn gave the defendant the marked money.

Officer Pates testified that at the time of the alleged sale he was standing on the southwest corner of 48th Street and Indiana Avenue, about 100 yards from the two men, and that he "saw an exchange of--a movement of hands where it looked as though they were exchanging something." Both Officer Pates and Flemister testified that Flemister came back to the car and handed a package to Officer Pates which showed a positive reaction when field-tested by the officer. Flemister told Officer Pates that it was what he had purchased from the man [defendant].

Officer Pates further testified that Flemister got into the squad car and as they were driving near 47th and Indiana, he pointed out the defendant who ran into a pool-room. Officer Pates ran after him and told him he was under arrest. A search of the defendant disclosed no money on his person. This testimony of Officer Pates is corroborated by that of Officer Tolbert and of Flemister.

The defendant took the stand in his own behalf and testified that on May 17, 1967, he left the poolroom at 127 East 47th Street to see a friend; that he was walking on 47th Street to Prairie when he was called by Flemister who told him he was sick and wanted to "cop." The defendant said he told him he didn't know where to "cop"; that he had been off narcotics for two months. He stated that he then left the defendant and returned to the poolroom where he was later arrested.

Flemister testified that he had assisted the police in other cases of this kind and had been paid for his services on occasion; that he was now and had been a user of narcotics for 15 or 16 years, and had been convicted of armed robbery and burglary.

Officer Pates testified that he had known Flemister for two or three years and knew that he was an addict and that he had a criminal record. He further testified that Flemister had been repeatedly used as an informer, and that in two previous sale cases in which he had been used, convictions were obtained. He stated further that Flemister had been successfully used in cases involving the issuance of search warrants.

The defendant's first argument is that the evidence of Flemister was not clear and convincing; however, in the record all the testimony given by Flemister is corroborated by the testimony of Police Officers Pates and Tolbert. It could not be argued that Flemister had narcotics in his possession at the time he left the police officers to meet the defendant, nor does the defendant so argue. Therefore, the narcotics which Flemister gave the police after his meeting with the defendant must have come from some outside source.

Considering the close observation under which Flemister was kept by Officer Pates, such a conclusion would be very far-fetched. There is no plausible explanation as to how Flemister secured the narcotics except from the defendant.

It is well settled in this State that the corroborated testimony of an informer is sufficient to sustain a conviction even though the informer is a narcotics addict. People v. Larry, 30 Ill. 2d 533; People v. Carter, 69 Ill. App. 2d 448; People v. Smith, 41 Ill. 2d 158. In People v. Lemon, 70 Ill. App. 2d 413, the informant was an addict, and during the time he was under police surveillance both he and the defendant were temporarily out of sight of the police when he walked a block to the designated meeting place. In that case the court said at page 417:

> "The testimony of an informer and a narcotics user must be carefully considered and closely scrutinized. In this case all precautions were taken to make sure that no external factors would operate on the informer to cause him to do anything other than as instructed. The surveillance kept of him was adequate. The testimony of the informer was believable and was sufficiently corroborated by the other witnesses and evidence."

In People v. Hill, 83 Ill. App. 2d 116, the informer, the defendant, and an acquaintance of the informer, left a tavern and entered the lobby of a hotel across the street. The police could not observe any part of the transaction. The informer then left the hotel and met the police two blocks away where he gave them the packet of heroin he said he got from the defendant. The defendant was not arrested until five or six weeks later. There was nothing in the evidence to indicate that any of the marked money had been recovered. The conviction was

based upon the testimony of the informer, a narcotics addict, and the testimony of the police who observed the two together and overheard a conversation between them regarding narcotics. The conviction was upheld, and the court said at page 121:

> "That the official did not see the exchange of money and heroin between the informer and the defendant is not fatal to the State's case. Convictions have been affirmed in many cases where the exchange was not witnessed if attendant circumstances lent credence to the informer's testimony. [Citing cases.]"

In People v. Bazemore, 25 Ill. 2d 74, cited by the defendant, the court reversed the conviction of the defendant for the sale of narcotics. The informant witness for the State was an admitted narcotics addict. In its opinion the court pointed out that there was no corroboration of the informer's accusation since there was not a close police surveillance of the transaction, no immediate arrest, nor was there a recovery of the marked money. That is not applicable to the case before us.

In People v. Romero, 54 Ill. App. 2d 184, the court said at page 188:

> "Although the testimony of a narcotic addict is scrutinized with caution, his testimony may be sufficient to sustain a conviction if it is credible under the surrounding circumstances. . . . The test is not whether an addict informer's testimony is uncorroborated, but whether his testimony is credible under the surrounding circumstances."

People v. Carter, 69 Ill. App. 2d 448, was a case in which the testimony of the informer was supported by "an immediate arrest of defendant, after a fairly close surveillance of both the informer and the defendant." The court held that the evidence was sufficient and quoted [p.453] from People v. Romero, supra, the well-recognized

rule that the "court will not substitute its judgment on the matter of the credibility of witnesses and the weight to be given their testimony where the trier of fact saw and heard their testimony, unless we can say that the proof was so unsatisfactory as to justify a reasonable doubt as to the defendant's guilt."

In People v. Martin, 63 Ill. App. 2d 492, the court laid down the rule that the test is whether, under all the surrounding circumstances, the testimony of the informer is believable. People v. Norman, 28 Ill. 2d 77.

In the case before us the defendant was under close observation during the entire time of the transaction, and the police officers testified that they saw something passed between the defendant and the informer. Furthermore, there is testimony in the record that up to two months before the transaction the defendant had been a narcotics user.

The defendant was proved guilty beyond a reasonable doubt, and the judgment is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

110 I.A. 2nd 101

53416

MACHINERY, SCRAP IRON, ETC., LOCAL UNION NO. 714, I.B. of T., a voluntary unincorporated association, Plaintiff-Appellant, v. CHICAGO ROLL FORMING CORPORATION, an Illinois corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Joseph B. Hermes, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiff labor organization filed a complaint against the defendant corporation charging the latter with failure to pay the former $3,780.00 in union dues and initiation fees which the corporation had collected from union members under the terms of a collective bargaining agreement. The defendant failed to appear and the court ordered a default judgment against it for $3,780.00 and costs.

About 37 days after the entry of the judgment, the defendant filed a motion to vacate and a verified petition to support it. The petition alleged that the attorney for the defendant failed to file an appearance on the return day because of illness and that the defendant had a good and meritorious defense to the plaintiff's cause of action. It prayed for relief under section 72 of the Civil Practice Act.

A hearing on the motion was held and the trial court entered an order vacating the default judgment and setting the cause

for trial. The plaintiff contends that the court erred in vacating the judgment because the petition in support of the motion to vacate was defective—that it did not contain allegations of fact to support the claim of a good and meritorious defense and did not demonstrate due diligence in seeking to vacate the default judgment.

The defendant-appellee has not submitted a brief in this court. When an appeal is perfected and the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal. People ex rel. Food Empire, Inc., v. City of Chicago, 102 Ill.App.2d 87, 243 N.E.2d 622 (1968); Woodward v. Woodward, 96 Ill.App.2d 251, 238 N.E.2d 269 (1968); 541 Briar Place Corp. v. Harman, 46 Ill.App. 2d 1, 196 N.E.2d 498 (1964). Moreover, after examining the record in this case, we conclude that the defendant's failure to contest the plaintiff's appeal is tantamount to a confession of error.

The order vacating the default judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded
with directions.

Sullivan, P.J., and Schwartz, J., concur.

110 I.A. 2nd 102

No. 53543

CHARLES GUSTAV TEACH, Plaintiff-Appellee, v. H. & H. TANK INSTALLERS, INC., a corporation, and JACK HARRINGTON, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HON. JAMES R. WATSON PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is a petition for leave to appeal from an order granting a new trial in a jury case. Plaintiff brought suit to recover for injuries sustained when he fell from a bucket being used on a piece of construction equipment. The defendants were H. & H. Tank Installers, Inc., (H & H), the owner of the equipment, and Jack Harrington, the operator thereof. At the close of plaintiff's case the court directed a verdict in favor of H & H. The issue of Harrington's liability was submitted to the jury and a verdict of not guilty returned. Plaintiff filed a motion for new trial in which he alleged that the verdict was contrary to the manifest weight of the evidence and that defense counsel had been guilty of fifteen acts of misconduct. The court found that the verdict was not contrary to the manifest weight of the evidence, but ordered a new trial because of "numerous instances of misconduct by counsel for the defendant." Defendants contend that the directed verdict in favor of H & H was proper and that the record does not support the finding that there was misconduct by defendants' attorney during the trial. The facts follow.

One Warren DeWinter, plaintiff's brother-in-law, wanted to procure some stone coping from the top of a filling station wall at 103rd Street and South Park Boulevard in Chicago.

The station was being demolished by Joseph Borst, the general contractor. H & H was engaged as a subcontractor to remove an old gas tank. Harrington was an officer of H & H. DeWinter enlisted the help of Harrington, George Keota, Robert Borst and the plaintiff to assist him in removing the stone coping from the wall. They used a piece of equipment called a "Dyna-hoe" to lift themselves to the top of the wall where they could dislodge the coping and convey it to the ground. The machine was under lease to H & H and Harrington operated it. It combined a back hoe for digging trenches and an end loader for loading material. The end loader is a bucket six feet wide and 30 inches deep and is lifted and lowered by arms on each side. Movement of the bucket is controlled by a single lever. If the operator pulls the lever back, the bucket moves upward. If he pushes the lever forward, the bucket descends. The speed at which the bucket moves is controlled by the distance the operator pushes or pulls the lever.

Plaintiff together with DeWinter and Borst climbed into the bucket and Harrington raised it to the top of the wall. The three men stepped onto the roof and loaded several pieces of stone into the bucket. They climbed back into the bucket and Harrington proceeded to bring them down. He testified that Teach was not holding on to the side of the bucket. DeWinter supported Teach's testimony that he was. The bucket dropped suddenly, then stopped abruptly, throwing the plaintiff and DeWinter to the ground eight feet below. Harrington testified that the bucket dropped six to eighteen inches. Plaintiff testified that it dropped two to three feet and DeWinter estimated that it dropped three to four feet. An

expert witness testified that only an operative error could cause a sudden drop in the bucket such as happened here.

Defendants' first contention is that the directed verdict in favor of H & H was proper and that the court erred in granting a new trial as to it. The order granting a new trial does not explicitly limit the new trial to an action against defendant Harrington, but it is clear that this is what was intended. Plaintiff admits this in his brief and this renders that point in defendants' petition moot.

Defendants' second contention is that the record does not support the trial court's finding that there was misconduct on the part of defense counsel at the trial. He argues that there is not the slightest evidence of misconduct of counsel and that the allowance of the motion for new trial was a gross abuse of the court's discretion.

In his post trial motion for new trial plaintiff alleged fifteen separate acts of misconduct. Many of these concerned statements made by defense counsel during argument to the jury or on cross-examination which inferred that the sudden drop in the bucket was caused by a shortage of oil in the hydraulic system of the machine or by a leak or by air bubbles in the hydraulic system. No evidence was adduced to support such an inference. The expert witness specifically testified that none of these things could have caused a sudden drop and Harrington testified that there was no defect in the machine itself and that he never subsequently reported that it was not operating properly. The question for us to determine is whether this is an adequate basis for the trial court's order granting a new trial.

It is impossible for us to tell the effect that counsel's improper statements have on a jury. The trial judge

is in a position to appraise the effect of improper or misleading comment in that he is able to observe at first hand the demeanor of counsel, his emphasis in argument, the reaction of the jury and the many other intangibles not available to us. Potter v. Ace Auto Parts and Wreckers, Inc., 49 Ill. App. 2d 354, 199 N.E.2d 618. We cannot say that the trial court abused its discretion in finding that defense counsel's conduct when viewed cumulatively prejudiced the plaintiff to such a degree that a new trial was required.

LEAVE TO APPEAL IS DENIED.

SULLIVAN, P.J. and DEMPSEY, J. concur.

110 I.A. 2nd 114

52734

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIE PAYNE, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Joseph A. Solan, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury, the defendant, Willie Payne, was found guilty of deceptive practices, a violation of Ill. Rev. Stat. (1965), ch. 38, §17-1 (e). Judgment was entered and the defendant was sentenced to four months in the House of Correction. Thereafter, his written motion for a new trial and in arrest of judgment was denied. The defendant appeals contending that the criminal complaint, initiating this prosecution, does not state an offense in that it discloses a certain month and day (i.e., May 29) but not the year in which the crime occurred thereby depriving him of a possible statute of limitations defense. Furthermore, it is urged that the trial court committed reversible error in: (1) not advising the defendant of his right to, nor providing him with, adequate counsel; (2) not providing a court reporter so as to preserve a transcript of the proceedings; and (3) not holding a hearing as to aggravation and mitigation before sentencing.

This case comes to us on the common-law record only. Apparently, the defendant elected not to employ Illinois Supreme Court Rule 323 (c) (Ill. Rev. Stat. 1967, ch. 110A, §323 (c)) which permits a "bystander's" report of the proceedings to be certified by the trial court if no verbatim transcript is available. Rule 323 (c) provides in part: "If no verbatim transcript of the evidence or proceedings is obtainable, the appellant may prepare

a proposed report of proceedings from the best available sources, including recollection. . . . The (trial) court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings." This "bystander's" report of proceedings is made applicable to criminal appeals by Illinois Supreme Court Rule 612 (c), Ill. Rev. Stat. (1967), ch. 110A, §612 (c).

The crime involved in this case is deceptive practices by use of a credit card, a violation of ch. 38, §17-1 (e). A conviction under this subsection of the statute may be either a felony or a misdemeanor depending upon whether the value of the property, labor or services so obtained does or does not exceed $150.00. From a reading of the criminal complaint found in the instant common-law record, we note that a misdemeanor and not a felony is involved in the instant appeal. The sworn complaint signed by an agent of the credit card issuing corporation indicates that two pairs of men's shoes valued at $47.74 were obtained by the accused through the use of a credit card which the defendant knew was issued to a man other than himself. With this background information, we now turn to a consideration of the matters urged by the defendant in this appeal.

The initial contention of the defendant is that the complaint upon which he was convicted does not properly state an offense in that it fails to allege a date which is within the applicable statute of limitations--eighteen months for a misdemeanor, see Ill. Rev. Stat. (1965), ch. 38, §3-5. This contention was presented to the trial court in the defendant's written motion for a new trial and in arrest of judgment. The motion was denied. We have examined the complaint and note that it indicates the date of the crime to be: "29 May." The complaint does not mention the year in which the crime occurred. The contention of

the State's Attorney is that the failure of the body of the complaint to state the year of the offense cannot be raised for the first time by a motion in arrest of judgment.

If an indictment, information or complaint fails to allege the time and place of the offense but the accused does not file a pre-trial motion to dismiss the charge, the law of waiver precludes him from attacking the sufficiency of the charge on these grounds by a motion in arrest of judgment after he has been convicted. People v. Blanchett, 33 Ill. 2d 527, 534, 212 N.E. 2d 97, 100 (1965). In the Blanchett case, the Illinois Supreme Court held that a motion in arrest of judgment (ch. 38, §116-2) should only be granted if the court was without jurisdiction of the cause or if the indictment, information or complaint did not charge an offense. This latter provision was interpreted to mean that the indictment, information or complaint did not set forth the nature and elements of the offense charged as required by ch. 38, §111-3 (a) (3). Failure of the charge to mention the time and place of the offense was insufficient in law to support a motion in arrest of judgment. Any failure on the part of the State to mention the time and place of the offense was deemed waived by the defendant under the provisions of ch. 38, §114-1 (b) if he did not file a timely pre-trial motion to dismiss the charge.

The record in the case at bar indicates that the defendant did not file a pre-trial motion to dismiss the complaint on the grounds that the year of the offense was lacking. No motion to dismiss was presented to the court. In all other respects, the complaint adequately advised the defendant of the nature and elements of the crime with which he was charged so that he could prepare his defense. The defendant cannot now successfully attack the complaint by a motion in arrest of judgment on the grounds that the year of the crime is not found in the complaint.

The remaining three contentions of the defendant are not properly before this court because they were not included in his written motion for a new trial and are thereby waived. Apparently, the defendant did not obtain counsel of record until after he had been convicted. That counsel also represents him on appeal and drafted one combined written motion in arrest of judgment and for a new trial which was presented to the trial court and was denied. The written motion for a new trial did not contain any of the errors now presented to this court in support of a reversal.

It is settled law in Illinois that "Where the grounds for a new trial are stated in writing, the accused is limited on review to the errors alleged therein and all other errors are deemed to have been waived." People v. Gratton, 28 Ill. 2d 450, 454, 192 N.E. 2d 903, 905 (1963). See also People v. Touhy, 31 Ill. 2d 236, 240, 201 N.E. 2d 425, 428 (1964) and People v. Greer, 30 Ill. 2d 415, 417, 197 N.E. 2d 22, 23 (1964). The reason for this rule is found in People v. Irwin, 32 Ill. 2d 441, 443, 207 N.E. 2d 76, 78 (1965), wherein the court stated:

> ". . . Requiring defendant's written motion for a new trial to specify the errors allegedly entitling him to a new trial may save the delay and expense inherent in an appeal in those instances where the motion is meritorious. Additionally, it focuses the attention of the trial judge upon those aspects of the proceedings of which the defendant complains, and gives to the reviewing court the benefit of the judgment and observations of the trial court with reference thereto. In short, we believe this waiver rule a salutary one serving a legitimate State interest in that it tends to eliminate unnecessary reviews and reversals."

The defendant urges that we rule upon the three alleged incidents of prejudicial error (i.e., lack of counsel, transcript, and hearing in mitigation) although not included in his written post-trial motion because these are "plain errors affecting substantial rights" which, under present Supreme Court Rule 615, Ill.

Rev. Stat. (1967), ch. 110A, §615 (a), we may notice although not brought to the attention of the trial court. We are not persuaded by such an argument within the facts and circumstances of the instant case. It is to be noted that the defendant did not file a "bystander's" report of the proceedings as permitted by Illinois Supreme Court Rule 323 (c) which would have been certified by the trial court and which would have substituted fact for speculation as to whether or not the defendant was indigent; whether or not the court advised him of his right to counsel; whether or not the defendant knowingly and understandably waived his right; and whether the defendant requested a hearing in mitigation. The defendant asks that his conviction be reversed. On the basis of the record presented to us by this defendant, we cannot reverse this conviction.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

NO. 52709

AGATHA NUGENT, Plaintiff-Appellant, vs. CITY OF CHICAGO, a municipal corporation, Defendant-Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE RICHARD MILLS, PRESIDING.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

The plaintiff, Agatha Nugent, filed suit in the Circuit Court of Cook County against the defendant, City of Chicago, for personal injuries which she allegedly sustained as a result of falling on a Chicago sidewalk. Judgment was entered on the jury verdict of not guilty. The plaintiff's motions for a directed verdict at the close of all the evidence, for judgment notwithstanding the verdict, and for a new trial were denied whereupon the plaintiff prosecutes this appeal.

The plaintiff, a woman 79 years of age, testified that on March 20, 1962 at about 1:30 P.M. on a dry day, she was walking in a westerly direction on the City sidewalk adjacent to Capizzi's Restaurant which is located at 6140 West North Avenue in Chicago. She was looking straight ahead and was walking "approximately in the center of the sidewalk" when her left heel caught in a hole in the sidewalk causing her to fall on her left hip. She was taken to Oak Park Hospital where she was operated upon and where she remained for more than two months. From photographs of the relevant portions of the sidewalk, the plaintiff identified this hole to be between five and six inches long, three inches wide, and about one and one-half inches deep. The photographs of the sidewalk indicated that this hole ran vertically to the

sidewalk and was located immediately to the right of the center line. On cross-examination, Mrs. Nugent stated that she was walking to the left of the center line when her left heel caught in the hole which caused her fall and resultant injuries.

Another witness for the plaintiff was Herbert Jones, an attorney, who testified that he was familiar with the area of sidewalk since 1959. He stated that since 1959 the sidewalk had many cracks and broken spots with a vertical break near the center of the sidewalk. The witness indicated that plaintiff's photographs of the scene accurately portrayed the breaks and cracks to which he was referring.

The plaintiff presented the testimony of Sam Eppolito who was a civil engineer for the City of Chicago in the Department of Streets and Sanitation. His department controlled the inspection and repair of city sidewalks. Sidewalk defects are only repaired upon a complaint being brought to his department's attention since the city does not employ inspectors who periodically inspect sidewalks absent a complaint or accident. He testified that on August 21, 1962 his department reported to the Department of Law, City of Chicago that the area at 6140-42 West North Avenue had "a 30 foot by 10 foot sidewalk with 5 stones cracked, broken, partly missing, settled and with a 2 inch vertical offset." The term offset means the variation in height between grades of the sidewalk. Such a condition, in the opinion of the witness, would constitute "a tripping hazard." The department's records reveal that no repair work had been done or that any complaints had been made prior to the accident.

During the plaintiff's case, several witnesses were called relative to the injuries sustained by Agatha Nugent. It is unnecessary to discuss their testimony because the issue of damages is not relevant to the issues presented by this appeal.

The defendant's entire case consisted of its presenting into evidence a U.S. Weather Report which showed that there had been no precipitation on the date in question--a fact admitted by the plaintiff.

It is the plaintiff's position that a prima facie case was established by her which in no way was rebutted by the City, and, therefore, the trial court erred in denying her motion for directed verdict at the close of all the evidence. The plaintiff also reasons that the court erred in denying her motion for judgment notwithstanding the verdict and in denying her motion for a new trial on the sole issue of damages or, in the alternative, for a new trial. It is also urged that the jury's verdict is contrary to the manifest weight of the evidence.

The plaintiff asserts that since her proffered evidence was uncontradicted, she was entitled to a recovery as a matter of law. However the proof of uncontradicted facts does not always justify a conclusion that the plaintiff has sustained his claim for recovery in a negligence action. Even where the facts are admitted or undisputed but where a difference of opinion as to the inference that may legitimately be drawn from them exists, such questions as negligence and contributory negligence ought to be submitted to the jury as it is the function of the jury to draw the inference. Cloudman v. Beffa, 7 Ill. App. 2d 276; Jung v. Dixie Greyhound Lines,

Inc., 329 Ill. App. 361.

In Illinois, questions of negligence, due care, and proximate cause are ordinarily questions of fact for a jury to decide. (Bolander v. Gypsum Engineering, Inc., 87 Ill. App. 2d 325.) A reversal or remandment of the instant case would require this court to conclude that the jury was not confronted with a legitimate factual question on any or all of these issues. Upon a review of the record, we are not prepared to arrive at such a conclusion.

The law does not exact of a municipality the duty of keeping all sidewalks in perfect condition at all times, and slight inequalities in level or other minor defects frequently found in traversed areas are not actionable. (Storen v. City of Chicago, 373 Ill. 530.) In addition, a municipality will not be liable for injuries resulting from a defective sidewalk unless it has actual notice of the defective walk or unless it has constructive notice of such facts and circumstances, as would by the exercise of reasonable diligence, lead a prudent person to such knowledge. (Roberts v. City of Sterling, 22 Ill. App. 2d 337.) In the instant case, there was no evidence that the City had actual notice of the defects prior to the accident. There was uncontradicted testimony from Herbert Jones that the sidewalk had contained cracks and breaks since 1959. However, whether the defects had existed for a sufficient length of time and under such circumstances so as to constitute constructive notice of the condition is generally a question for the jury to decide as a factual matter. (Trojan v. City of Blue Island, 10 Ill. App. 2d 47.) The fact that the city engineer testified that a two inch offset would, in his opinion, be "a tripping hazard" does

not, in itself, make the question of the city's negligence a question of law rather than one of fact. In Arvidson v. City of Elmhurst, 11 Ill. 2d 601 the Supreme Court held that where, as here, the alleged sidewalk defect was a two inch variation the question of the city's negligence for such a defect must be submitted to the jury to be considered with all of the facts and circumstances in connection with the accident. See also: Healy v. City of Chicago, ____ Ill. App. 2d _____, No. 51393.

In this case, the evidence is undisputed that the plaintiff, after having walked east on the same sidewalk a few minutes earlier, walked back west across the area in question while looking straight ahead and not at the pavement itself and, while unaware of anything unusual about the sidewalk, fell upon her left hip. Here also the issue of the plaintiff's exercise of due care was a jury question. Swenson v. City of Rockford, 9 Ill. 2d 122; Healy v. City of Chicago, supra.

The plaintiff initially stated that she was walking on "about the center of the sidewalk" when she fell. Later on cross-examination, she stated that her left heel stepped into the hole causing her fall as she was walking in a westerly direction on the section "closer to the curb." This section of the walk would be to the plaintiff's left of the center line. We are mindful of the fact that the plaintiff was 79 years of age and that her account of the occurrence might not have been precise in all details. However in view of this testimony, it was the jury's function to determine whether a hole with a two inch offset admittedly located to the plaintiff's right of the center line could have been the

proximate cause of the plaintiff's fall if her "left" heel stepped into the hole while she was walking to the left of the center line. The credibility and weight to be accorded her testimony was to be determined by the triers of fact.

In view of the aforementioned inferences which were properly left for the jury's determination, we believe that the trial court correctly denied plaintiff's motions for directed verdict and for judgment notwithstanding the verdict since this is not a case "in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." (Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, 510.) Nor do we believe that the inferences and conclusions were so unreasonable as to require us to conclude that the verdict in favor of the defendant was contrary to the manifest weight of the evidence. A reviewing court cannot substitute its judgment for that of the jury where the established facts leave room for different conclusions to be drawn by reasonable men. A verdict cannot be set aside merely because we feel that conclusions other than those drawn by the jury would be "more reasonable." Allendorf v. E. J. & E. Ry. Co., 8 Ill. 2d 164; Dowler v. N. Y., C. & St. L. R. R. Co., 5 Ill. 2d 125; Bolander v. Gypsum Engineering, Inc., supra.

Accordingly, the judgment entered on the verdict in favor of the defendant is affirmed.

AFFIRMED.

SCHWARTZ and DEMPSEY, JJ., Concur.

52800

ABST.

110 I.A.2d
P. 167

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

JOHN E. MALONEY (Impleaded),

Defendant-Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY

HONORABLE FRED G. SURIA, JR. Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

John E. Maloney [hereafter referred to as defendant] was charged in six indictments with criminal offenses. He first entered a plea of not guilty, and after he had been fully advised of his rights, changed the plea to one of guilty. He was tried by the court without a jury on August 28, 1967.

During the trial the parties stipulated to facts sufficient to support each of the indictments. After the stipulations were concluded the court held a hearing in aggravation and mitigation. In aggravation the State presented the facts that defendant had been charged and convicted of criminal trespass to motor vehicle in April of 1963, and placed on one year supervision; that in June 1963, an auto theft charge was reduced to petty theft, and defendant served six months in Vandalia; that in December 1963, on another reduced auto theft charge, he served one year in the House of Correction; and that in June 1965, on an auto theft charge reduced to criminal trespass to a motor vehicle, he was again placed on supervision.

In mitigation defense counsel stated that defendant was 21 years of age, that he had pleaded guilty to the charges in the indictments, and that "this, also, is the first step toward rehabilitation." Counsel also stated that defendant's family was in court and that the mother hoped she would see her son "in the near future, possibly when he comes out, rehabilitated, . . ."

The defendant was found guilty on each indictment, and on each indictment was sentenced to a term of not less than four nor more than eight years in the penitentiary, the sentences to run concurrently.

In this court the defendant has made no objection to any procedural matter resolved in the trial court, and states that the issues presented for review are: whether the minimum sentence imposed was unduly severe; whether the sentence as a whole was based on adequate criteria; and whether the hearing in aggravation and mitigation was adequate.

The defendant does not urge any points which could be brought out in mitigation if another hearing were held. As to the contention that the sentence was too severe, this court feels that the facts set out in the first part of this opinion support the sentence.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

53144

VICTOR MANUFACTURING AND GASKET CO., a Corporation,	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
vs.	)	
CITY OF CHICAGO, a Municipal Corporation,	)	Hon. Charles S. Dougherty, Presiding.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment declaring a particular Chicago Zoning Ordinance classification unconstitutional as applied to two parcels of vacant land owned by the plaintiff and located, respectively, at 1000-06 South Menard Avenue and 1100-06 South Menard Avenue in Chicago. The declaratory judgment order goes on to state that the plaintiff has a clear, legal right to use any part of both vacant parcels for the development, construction, and use thereon of parking lots to be provided for its employees and visitors to its adjacent plant.

In this appeal, the defendant contends that the plaintiff failed to prove by clear and convincing evidence that the zoning classification was arbitrary and unreasonable as applied to the plaintiff's property and therefore did not overcome the rebuttable presumption that the zoning classification was a valid exercise of the municipality's police power.

The defendant-appellant has filed his brief, abstract, and record and has complied with all statutory requirements and with the rules of this court. An attorney did file an appearance for the plaintiff-appellee, but approximately one month later he filed his motion to withdraw as appellee counsel pursuant to the instructions of his client. This motion to withdraw was granted. No additional appearance has been filed for the plaintiff-appellee. No brief has been filed in this court by the plaintiff-appellee.

[1] When an appeal is perfected and the appellee does not submit an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal. People ex rel. Food Empire, Inc., v. City of Chicago, 102 Ill. App. 2d 87, 243 N.E. 2d 622 (1968); Ogradney v. Richard J. Daley, Mayor, 60 Ill. App. 2d 82, 208 N.E. 2d 323 (1965); C.I.T. Corp. v. Blackwell, 281 Ill. App. 504 (1935).

Pursuant to the foregoing rule, we have decided to reverse the instant judgment without consideration of the cause on its merits.

JUDGMENT REVERSED.

BURKE, J., and MC CORMICK, J., concur.

110 I.A. 2nd 343

52725

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ANDREW WATSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Francis T. Delaney, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury, the defendant, Andrew Watson, was found guilty of armed robbery. After his written motions in arrest of judgment and for a new trial had been denied, judgment was entered and the defendant was sentenced to three to six years in the State Penitentiary. He appeals.

The complaining witness, Donald Ryan, testified that on February 18, 1967, he was employed by the Chicago Transit Authority as an electrician. At approximately 6:30 P.M. on that date, he was on a ladder and was replacing a light socket on an elevated platform in Chicago. He saw that the defendant and another man were approaching him. Shortly thereafter, the defendant repeatedly asked to see a wrist watch which Ryan was wearing, but the complaining witness refused. The defendant then grabbed the watch and slipped it off Ryan's arm. Ryan jumped off the ladder he had been standing on, grasped the defendant by the shoulder, and demanded the return of his watch. The defendant refused to return it.

At this time, the complaining witness saw that his watch was in the defendant's hand, but he also noticed that the watch band was exposed. In an effort to regain his watch, Ryan slipped his hand through the expandable watch band. At this time the man who was with the defendant produced a gun and told Ryan to step back. Ryan jerked back and in so doing separated the watch band from the watch itself. Ryan then had the watch

band and the defendant had the watch.

Continuing, Ryan stated that both the defendant and his companion then boarded an elevated train which had stopped in the station. Seeing that the train was not going to move, both men ran off the train and down to the street where they were arrested by a police officer. In conclusion, the complaining witness testified that his watch was never recovered and that he never gave the defendant permission to take it.

On cross-examination, the complaining witness stated that he did not know that the defendant and the second man were together until the latter produced a gun and told Ryan to step back. Thereafter, the second man put his weapon away and both assailants entered an elevated train which had stopped at the station. The complaining witness boarded the train with them and said that he wanted his watch returned. Both the defendant and his companion were standing side by side in the crowded train. In time, both fled from the train and were arrested on the street below the elevated station.

The arresting officer, William Johnson, testified for the State and stated that he arrested the defendant and another man as both men were leaving the entrance to an elevated train station. The complaining witness, standing at the top of the elevated platform, had gained the attention of this police officer and the arrests followed. In searching the man that was with the defendant, the arresting officer found and seized a loaded gun. The gun was admitted into evidence and was the same weapon which the complaining witness had earlier identified as being similar to the gun drawn by the defendant's companion on the elevated platform. At the time of their arrest, both the defendant and the second man were emerging from the entrance to the elevated station. They were apart but were running together.

On cross-examination, Officer Johnson testified that after their arrest, the complaining witness confronted the two men and said he had been robbed by the two of them. This officer searched the defendant but did not find a watch.

The defendant, the only witness for the defense, stated that he met his friend in a tavern on the afternoon of February 18, 1967. They drank together for a few hours. The accused admitted that he and his companion entered the elevated station and walked up the stairs together. However, it was his testimony that his friend and not the defendant asked the complaining witness about the watch. The defendant never saw any crime committed but rather boarded a waiting elevated train. His companion also got on the train followed by the complaining witness, who said to the friend of the defendant, "Give me my watch."

The defendant then left the train because he now knew that his friend had committed a crime. His companion got off behind him, and both men were arrested soon thereafter on the street below the elevated station. It was the accused's testimony that when the complaining witness confronted the defendant and his friend immediately after their arrest, the complaining witness stated that the defendant had pulled a gun on him and the friend of the defendant had his watch. In addition, the defendant testified that he never saw a gun exhibited on the elevated platform, and he did not know that his companion was carrying a gun. The accused denied that he was running when arrested but admitted that he was walking rather fast. The defendant denied taking the watch of the complaining witness and denied talking to the complaining witness on the elevated platform.

On appeal, the defendant urges that his conviction should be reversed because: (1) the prosecution only proved that the defendant was guilty of theft from the person and failed to

prove beyond a reasonable doubt that the defendant, by the use of force or threatening the imminent use of force while armed with a dangerous weapon, took property from the complaining witness so as to be guilty of armed robbery; (2) the trial court committed reversible error in admitting and considering incompetent evidence given by the complaining witness concerning the modus operandi of robberies in general on Chicago Transit Authority elevated stations.

Stated differently, the initial contention of the defendant is that he should have been found guilty only of theft from the person since this offense had been completed when he slipped the watch off the wrist of the complaining witness and refused to return it. The argument goes on to state that neither intimidation nor force could be found in the fact that the defendant's companion later drew a gun as by this time the nonviolent taking of the watch had been completed.

We are of the opinion that all of the events which occurred on the elevated platform--the continued requests to see the wrist watch of the complaining witness; the taking of the watch from the person of the complaining witness; his attempt to recover it by asking the defendant for its return; the imminent struggle between the complaining witness and the defendant for its continued possession as evidenced by the victim's placing of his hand through the exposed expandable watch band while the defendant was holding the watch itself; the drawing of the gun by the defendant's admitted companion; the restraint thereby exercised upon the actions of the complaining witness; the attempted escape from the scene of the crime by the defendant and his companion; and their eventual joint arrest--must be regarded as a continuous series of events constituting a single occurrence. People v. Chambliss, 69 Ill. App. 2d 459, 466, 217 N.E. 2d 422,

426 (1966); People v. Brown, 76 Ill. App. 2d 362, 370, 222 N.E. 2d 227, 230 (1966). We are therefore not persuaded by the initial contention of the defendant.

It is established law in Illinois that although mere presence at the scene of a crime is not enough to constitute an accused a principal, one may still aid and abet without actively participating in the overt act. If the proof in a given case shows that the defendant was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that the defendant assented to the commission of the crime, lent to it his countenance and approval, and was thereby aiding and abetting the crime. People v. Washington, 26 Ill. 2d 207, 209, 186 N.E. 2d 259, 261 (1962); People v. Cole, 30 Ill. 2d 375, 379, 196 N.E. 2d 691, 693 (1964); People v. Smith, 391 Ill. 172, 180, 62 N.E. 2d 669, 673 (1945).

In the instant case, it is undisputed that the defendant, with his companion, was at the scene of the crime. The evidence presented by the State, if believed, showed that the defendant did not oppose or disapprove of the actions of his companion in the exhibiting of the gun. A struggle between the complaining witness and the defendant for continued possession of the wrist watch was imminent when the defendant's companion drew his gun and told the complaining witness to step back. Seeing this weapon, the victim complied and ceased his threatened altercation with the defendant. Both men fled together and were jointly arrested. At his trial, the defendant's defense was to exculpate himself by inculpating his companion as the only criminal.

If the events on the elevated platform had concluded

when the accused slipped the watch off the wrist of the complaining witness and fled, the defendant could only be properly convicted for theft from the person and not armed robbery since the taking was not accompanied by force or threatening the imminent use of force while armed with a dangerous weapon. However, the events on the elevated platform did not cease with this non-violent taking of property. Rather, the defendant and his companion fled only after the latter had produced a gun and told the complaining witness to step back thereby preventing an imminent struggle between the complaining witness and the accused for the continued possession of the watch. The defendant did not tell his friend to put away the gun but rather accepted his aid and was able thereby to retain possession of the watch. Both fled together.

The accused was indicted for both theft from the person and armed robbery. Two offenses did occur in the same continuous transaction. The defendant alone was guilty of theft from the person. The State proved beyond a reasonable doubt that he was also guilty of armed robbery under the principles of accountability found in Ill. Rev. Stat. (1965), ch. 38, §5-1 and 5-2 (c), as interpreted by the court in the Washington, Cole and Smith cases, supra. The accused was properly convicted and sentenced for the more serious offense of armed robbery. People v. Schlenger, 13 Ill. 2d 63, 66-67, 147 N.E. 2d 316, 318 (1958); People v. Duszkewycz, 27 Ill. 2d 257, 261-62, 189 N.E. 2d 299, 301 (1963).

[1] The second point urged by the defendant is not properly before this court. This contention, for appeal purposes, was waived when not presented to the trial court in the defendant's written post-trial motion for a new trial. People v. Irwin, 32 Ill. 2d 441, 443, 207 N.E. 2d 76, 78 (1965); People v. Gratton,

28 Ill. 2d 450, 454, 192 N.E. 2d 903, 905 (1963); People v. Touhy, 31 Ill. 2d 236, 240, 201 N.E. 2d 425, 428 (1964); People v. Greer, 30 Ill. 2d 415, 417, 197 N.E. 2d 22, 23 (1964). It should also be noted that a rebuttable presumption exists in cases tried by the court without a jury that it considers only competent evidence in reaching its decision. People v. Cox, 22 Ill. 2d 534, 539, 177 N.E. 2d 211, 214 (1961), cert. denied, 374 U.S. 855 (1963); People v. Delno, 35 Ill. 2d 159, 161, 220 N.E. 2d 190, 191 (1966). A review of the record in the case at bar indicates that the trial court, sitting as the trier of fact in this non-jury case, did not rely upon the alleged error, raised by the defendant in his second contention, in finding the accused guilty of armed robbery. Therefore, this contention is without merit.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

110 I.A. 2nd 344

53225

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
WILLIE WILSON, Defendant-Appellant.	COOK COUNTY.
	HON. JOHN C. FITZGERALD, Presiding

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Two indictments were returned against defendant. In one he was charged with theft of an automobile and in the other with criminal trespass to a vehicle arising out of the same transaction. A plea of not guilty was entered on both counts.

Defendant was convicted of criminal trespass to a motor vehicle upon a plea of guilty and sentenced to one year in the County Jail. The parties stipulated that defendant was discovered by police officers in a motor vehicle belonging to another while crouched under the dash working on the ignition wires without the permission of the owner of the car.

The Public Defender, appointed counsel for defendant, has filed in this court, a petition for leave to withdraw as appellate counsel and pursuant to Anders vs. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), has filed a brief in support of his petition which alleged the appeal was without merit.

The Court then notified defendant of the pending motion and petition and granted leave to file points in support of his appeal. Appellant did not respond.

The brief and argument state that the only grounds for appeal rest upon a failure to fully admonish defendant as to consequences of a change of plea to guilty. A review of the testimony at that time shows:

> "DEFENSE ATTORNEY: Your Honor, after conferring with [co-defendant] and Willie Wilson, it is their desire to withdraw their previously entered plea of not guilty to Indictment 67-2640 and enter a plea of guilty generally to that indictment.

THE COURT: Now, gentlemen, if you will be patient with me a little while longer, because I now have some further questions and answers that I have to put in the record before accepting your plea of guilty, and I know you are familiar with the questions and answers but the law requires me to ask these questions before accepting the plea of guilty.

You have been charged in this indictment with one count of theft and one count of criminal trespass. You know by pleading generally, that means the Court can find you guilty of either the theft or the criminal trespass count.

On the theft count, the law authorizes the Judge to sentence to the Illinois Penitentiary for not less than one nor more than ten.

On the criminal trespass charge, the law authorizes the Judge to sentence to the County Jail for not more than one year.

Now, you know that, right?

DEFENDANT WILSON: Yes.

* * * * *

THE COURT: And you are satisfied with the services of your counsel?

DEFENDANT WILSON: Yes, I am.

* * * * *

THE COURT: We have had a conference and suggestion has been made at the conference but you know that I cannot accept your plea of guilty unless I am convinced that in fact you are guilty and not influenced by the suggestion of the conference.

Now that means, Mr. Wilson, does that mean that you are in fact guilty?

DEFENDANT WILSON: Yes.

Defendant, twenty-seven years old, appeared to understand the explanation given by the Court.

[1] An examination of all the proceedings, as required by Anders, supra, reveals that a similar explanation was given to defendant at the time he chose a bench trial rather than a jury trial. Defendant's responses at both instances clearly show an understanding of the proceedings, charges and the choices involved.

The stipulated evidence and the full advice given to defendant

at every step of the trial lead us to conclude that the appeal lacks merit and if carried further would be frivolous. Appellant's counsel is granted leave to withdraw; judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

110 I.A. 2nd 326

No. 52551

JAMES NOLAN, Plaintiff-Appellee, v. COMBINED INSURANCE COMPANY, CAMPBELL, LOWRIE, LAUTERMILCH CORPORATION, MURPHY & MILLER, INC., and CARRIER CORPORATION, Defendants, and HULTGREN ELECTRIC CORPORATION, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HON. IRVING GOLDSTEIN PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Hultgren Electric Corporation (Hultgren) from a judgment on verdict for $20,000 for personal injuries sustained by plaintiff while installing asbestos insulation on the premises of Combined Insurance Company (Combined). The complaint is based on strict liability in tort pursuant to the holding in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182. The sole contention on appeal is that Combined's acceptance of certain work performed on its premises by Hultgren operates to relieve Hultgren from liability to third persons for any injury arising out of a defect in the work. The facts follow.

Combined entered into a contract with Murphy & Miller, Inc., (Murphy-Miller) for certain heating and ventilation work to be done in a building owned by Combined. In the performance of the contract Murphy-Miller purchased a "Hermetic Centrifugal Refrigeration Machine" from Carrier Corporation (Carrier) which was to be installed in the building. Murphy-Miller then entered into a subcontract with Hultgren under which Hultgren was

to make the needed external electrical connections for the installation of the machine. In the Spring of 1959 after Hultgren completed the electrical installation of the machine, it was put into operation. Just before it was started it was inspected by representatives of both Carrier and Murphy-Miller and was found by them to be in good running order. Plaintiff was employed by Culberg Asbestos Company and while engaged in the performance of his duties was placing insulation around certain pipes located in close proximity to the refrigeration machine. As he was working on a pipe which ran directly under the machine, he came in contact with an exposed electrical terminal on the side of the machine and was severely burned. This terminal connection was made by Hultgren and was not covered or insulated in any way.

The only point made by defendant in its Points and Authorities is that acceptance of the completed work by Combined operated to relieve Hultgren of liability to third persons for any injury arising out of a defect in the work. That point was not made on the trial of the case nor at any time prior to appeal.

It is a general rule that a party will not be permitted to argue on appeal a defense not interposed by his answer. In Re Estate of Leichtenberg, 7 Ill. 2d 545, 131 N.E. 2d 487; Tarzian v. West Bend Mut. Fire Ins. Co., 74 Ill. App. 2d 314, 221 N.E.2d 293. Defendant seeks to avoid the operation of this rule by contending that there was a failure to plead an actionable wrong and that such failure can be raised for the first time on appeal. It is true that the failure to state some ground of liability recognized by the law can be raised at any time. Gustafson v. Consumers Sales Agency, 414 Ill.

235, 110 N.E. 2d 865; Wagner v. Kepler, 411 Ill. 368, 104 N.E.2d 231. In the instant case however that principle is not applicable since in our opinion the complaint states an actionable wrong. No law to the contrary is cited by the defendant.

Plaintiff alleged that the refrigeration machine was defective and in an unreasonably dangerous condition in that portions of the electrical system were left exposed on its outer surface, that it was in such defective condition at the time it left defendant's control, and that plaintiff was injured as a direct and proximate result of this unreasonably dangerous condition.

[1] The complaint states a ground of liability recognized by the law in accordance with the holding in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182. No other assignment of error having been made, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

SULLIVAN, P.J. and DEMPSEY, J. concur.

110 I.A. 2nd 376

52071

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CHARLES LEE THOMAS, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Herbert C. Paschen, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Charles Lee Thomas was found guilty, following a bench trial, of the offense of rape (Ill. Rev. Stat. (1963), ch. 38, §11-1). Judgment was entered on the finding and he was sentenced to a term of not less than fifteen nor more than thirty years in the Illinois State Penitentiary. This sentence was to run concurrently with one of fifty to seventy-five years imposed following a previous conviction for rape, such conviction having been appealed from and pending in the appellate court at the time of trial on the present charge. The defendant appeals alleging that he was not proven guilty beyond a reasonable doubt.

Mrs. Evelyn Plunkett, prosecutrix, was called by the State and testified that on the afternoon of February 8, 1966, the defendant, Charles Lee Thomas, who she had never seen before, called at her home representing himself to be a recruiter for the Youth Head Start Program; that when she asked for some identification he pulled a gun from his briefcase; that she whirled around and in so doing knocked the briefcase from his hand. She further testified that he then put the gun to her head, ordered her to pick up the briefcase and that after she complied he ordered her back into her apartment and directed that the two preschool age children who were at home be placed in the bathroom; that upon being asked, she showed him how to get out the back door; that he then proceeded toward the front of the apartment, stopping at the bedroom where he demanded that she remove her clothing.

Mrs. Plunkett testified that during these entire proceedings and during the rape which followed, defendant at all times kept his gun at her head.

Mrs. Plunkett testified that she told the defendant that she did not love her husband or words to that effect and that she wanted to be his, defendant's, girl friend; that he then told her that if she meant what she had said she should meet him at the corner of Sacramento and Madison Streets at 1:30 P.M. the following day.

Continuing her testimony, the prosecutrix described herself as hysterical when her husband arrived home some ten to fifteen minutes after the occurrence. She testified that when she was able to speak she related the above story to her husband and together they determined not to call the police, but rather that she should keep the rendezvous suggested by defendant for the following afternoon in hopes of apprehending him.

Mrs. Plunkett further testified that she and her husband went to the appointed place the following afternoon and that Mr. Plunkett got out of the car when defendant appeared on the corner; that a police car drove up at this time, and that at this point the defendant ran across the street and into a building; and that her husband and the police officer brought defendant from the building and placed him in the officer's car, at which time she identified the defendant as the man who had raped her the previous day.

Mr. Sylvester Plunkett, husband of the prosecutrix, was called by the prosecution and testified that when he returned home from work on the afternoon of February 8, 1966, he found two of his children crying on the stairs and his wife in the apartment, semi-clad and in a hysterical state. He testified that after his wife had regained her composure she told him what had transpired. His testimony at this point is essentially the same as that of

the prosecutrix both as to what she told him and the events of the following day, February 9, 1966.

Hubert Harnois, the arresting officer, was called as a witness for the State and testified to facts corroborating the testimony of Mr. and Mrs. Plunkett as to the arrest of the defendant and his identification by the prosecutrix. The officer testified that it was neither raining nor snowing at the time that the defendant crossed the street and entered the building in which he was arrested.

Charles Lee Thomas testified on his own behalf as follows: he was convicted of rape earlier in 1966; he first met prosecutrix in October of 1965, when he walked her home from a shopping trip; he saw her at her home on a number of occasions in the ensuing months and they had become intimate; he and prosecutrix discussed her leaving her husband and going with the defendant, but he could not undertake the obligation of her six children; he had given money to the prosecutrix when she complained of not being able to pay bills on her husband's salary. Defendant further testified that he visited the prosecutrix on the day of the alleged rape but did not have sexual intercourse with her on that occasion, rather, that he went to inform her that he had decided to marry someone else; that an argument ensued and prosecutrix finally stated to him that if he were going to leave he should at least give her some money, whereupon he informed her that he was to be paid the following day and expected to be gambling at Sacramento and Madison Streets and if she would come there he would give her some money.

With respect to the events surrounding his arrest, the defendant testified that he was gambling and had gone to a store to cash a twenty dollar bill; that it was raining and cold when he left the store and the traffic light was against him; that he waited near the doorway of the store until the light changed and

then darted across the street and entered the building where he had been gambling. The defendant further testified that as he crossed the street he noticed Mr. and Mrs. Plunkett and the police officer and thought, "something must be up here, I am going to get back in the building"; that his destination in the building had been the fourth floor, but when he reached the third he started back down and was arrested on the stairs.

Finally, the defendant testified that after he was placed in the police car Mrs. Plunkett came over to the car with her husband; that one Nathaniel Phillips knew of his relationship with Mrs. Plunkett (Nathaniel Phillips was not called as a witness); that he did not know Mr. Plunkett's first name or the names of the Plunkett children. No other witnesses testified on behalf of the defendant.

In arguing that he was not proven guilty beyond a reasonable doubt, defendant cites the case of People v. Szybeko, 24 Ill. 2d 335, 181 N.E. 2d 176 (1962) to support his theory that since the fact of rape was not corroborated, his conviction cannot stand unless the testimony of the prosecutrix was clear and convincing. The defendant misunderstands the holding in that case. Szybeko stands for the proposition that when the testimony of the prosecutrix, not the fact of rape, is uncorroborated such testimony must be clear and convincing. It is well settled that testimony of prompt complaint is sufficient to constitute corroboration of the testimony of the prosecutrix (People v. DeFrates, 395 Ill. 439, 70 N.E. 2d 591 (1946); People v. Hayes, 93 Ill. App. 2d 198, 236 N.E. 2d 273 (1968)) and such corroboration was present here. Mr. Plunkett testified that his wife was hysterical when he arrived at the scene and that when she regained her composure she related the incident to him. Thus, we need not consider whether the testimony of the prosecutrix was clear and convincing, and the question of whether the defendant was proven guilty beyond a reasonable doubt

is reduced to a question of the credibility of the witnesses.

The credibility of the witnesses and the weight to be given to their testimony are matters for the trial judge sitting without a jury and a reviewing court will not disturb the determination of the trial court unless the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Reaves, 24 Ill. 2d 380, 183 N.E. 2d 169 (1962); People v. Smith, 27 Ill. 2d 344, 189 N.E. 2d 257 (1963); People v. Henson, 29 Ill. 2d 210, 193 N.E. 2d 777 (1963). We have reviewed the record and find ample support therein for the trial court's determination. As noted above, the testimony of the prosecutrix was corroborated by that of her husband. In addition, there was evidence that defendant attempted to flee after he discovered the presence of Mr. Plunkett and the police officer, flight being recognized as competent as tending to show guilt. People v. Lobb, 17 Ill. 2d 287, 161 N.E. 2d 325 (1959). Finally, defendant's credibility was substantially impaired upon his admission that he had been previously convicted of the charge of rape.

We hold that the defendant was proven guilty beyond a reasonable doubt and thus the judgment of the trial court must be affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

53275

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
JACK A. KENT, Defendant-Appellant.	)	HONORABLE GEORGE B. DUGGAN Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, Jack A. Kent, was prosecuted for an alleged violation of the crime of resisting or obstructing a peace officer. The following statutes are involved:

Ill. Rev. Stat. 1967, ch. 38, § 31-1. Resisting or Obstructing a Peace Officer.] A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Ill. Rev. Stat. 1967, ch. 38, § 102-5. "Arrest".) "Arrest" means the taking of a person into custody.

Ill. Rev. Stat. 1967, ch. 38, § 107-2. Arrest by Peace Officer.) A peace officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or

(c) He has reasonable grounds to believe that the person is committing or has committed an offense.

Ill. Rev. Stat. 1967, ch. 38, § 4-5. Knowledge.] A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

On March 24, 1968, Officer Patrick Grady of the Chicago Police Department was assigned to guard duty at the Museum of Science and Industry in the City of Chicago. At about 5:30 p.m., he ejected a 10-year old boy from the museum. As he was taking him outside the museum the boy became abusive, kicking and hitting at the officer, who finally arrested him. A crowd of 30 or 40 people gathered, at which time three police officers came to Officer Grady's assistance, and the four officers carried the boy--each officer holding one of the boy's limbs--toward the police room inside the front door. At this point the defendant, Jack Kent [minister of the First Unitarian Church], approached the scene and demanded to know what was going on.

Officer Grady testified that the defendant got in front of the officers so that they had to walk around him, although the defendant made no physical contact with him and he did not see him make any physical contact with the other officers. Several other officers, however, testified that the defendant bumped them as they walked to the police room.

The defendant followed the police to the room in which the boy was placed and continued to demand entrance to the room where the child was screaming hysterically. Officer Grady testified to the following: "When we finally got to the office we took the boy in and had the door closed there. At this time the defendant was outside the door and making quite a bit of noise and he had already been warned if he didn't stop interfering with us we were going to have to place him under arrest." He stated that while he was in the room with the boy he heard Officer Erth go to the door and tell the defendant at least three times to keep still or they would have to lock him up for interfering with the

police. Officer Erth said of the defendant: "He continued to yell and said we had been mistreating his people for five days. He wanted to go into the room. Finally I told him he was under arrest, and when I went to effect the arrest he pushed my arm away and we had to use handcuffs to restrain him and he was placed inside the room."

None of the officers claimed that the defendant did anything to pull them away from the boy or help him escape, and the defendant denied touching any of the officers deliberately, saying that at most he might have inadvertently bumped into one of them as he walked beside them going up the stairs.

After a bench trial the defendant was found guilty and was fined $100. From that judgment this appeal is taken.

The defendant here argues that the State failed to prove he obstructed the police officers; that the State failed to prove the defendant was consciously aware of physically obstructing the officers; that the State failed to prove that the arrest of the 10-year old boy was an authorized act; and that the statute was construed unconstitutionally by the trial court.

In Landry v. Daley, 280 F. Supp. 938 [N.D.Ill.1968], a class action, the plaintiffs alleged that the defendants, officers of the City of Chicago or of Cook County, purposefully entered into a scheme to deprive plaintiffs of their constitutional guarantees by prosecuting or threating prosecution under state statutes or city ordinances which were unconstitutional on their face, and by committing other specified acts of harrassment. One of the statutes involved was the same as in the case before us, Ill. Rev. Stat. 1967, ch. 38, § 31-1. The case was heard before three judges in the Federal District Court. The attack on the statute was based on the argument that the statute was void because of vagueness and overbreadth, and was

too extensive. In construing the statute the court gave the words a reasonable and natural meaning, noting at page 959:

> "This statute is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. . . . Its enforcement, at times, may conflict with assembly, but in such instances, the public interest in discouraging violence and insisting upon the use of peaceful methods of obtaining redress from unlawful acts outweighs the recognition of the feelings of the demonstrators."

The court proceeded to discuss the import of the words "resisting" or "obstructing" and explained that they imply some physical act, and do not proscribe mere argument with an officer over the "validity of an arrest or other police action." What is prohibited is "some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent, or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest."

In People v. Raby, 40 Ill. 2d 392, the Supreme Court quoted with approval from Landry. In Raby, the defendant and several other persons conferred with the mayor of the City of Chicago about problems of racial segregation in the Chicago public schools. After the conference the defendant made a brief speech at the LaSalle Street entrance to the City Hall, and later, at the peak of the evening rush hour, the defendant and about 65 others went to the intersection of Randolph and LaSalle Streets where they sat or lay down, completely blocking traffic through the intersection. Police officers asked them to leave; they refused, and were placed under arrest about 20 minutes later. The defendant had intertwined his arms and legs with others and had to be untangled by the police in order to be arrested; he then "went limp" and had to be carried to a police van. In its

opinion the Supreme Court cited section 31-1, chapter 38, Illinois Revised Statutes 1967. The defendant had been sentenced to three months in the County Jail for resisting arrest. He appealed directly to the Supreme Court of Illinois. The court said at page 398:

> "The defendant attacks the resisting-arrest provision (Ill.Rev.Stat. 1967, chap. 38, par. 31-1) upon the ground that it fixes no standards for the ascertainment of guilt. This attack was recently rejected in Landry v. Daley (N.D. Ill. 1968), 280 F. Supp. 938, 959. In that case the court emphasized that the statute requires knowing resistance or obstruction, 'which considerably narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription' (280 F. Supp. at 959.). The court further noted that the statutory terms convey commonly recognized meanings. '"Resisting" or "resistance" means "withstanding the force or effect of" or the "exertion of oneself to counteract or defeat". "Obstruct" means "to be or come in the way of". These terms are alike in that they imply some physical act or exertion. Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest.' (280 F. Supp. at 959.) We agree with these observations, and we hold that section 31-1 is neither vague nor overbroad."

In the case before us we are then faced with a statute which, as construed, prohibits physical obstructions that serve as impediments to the performance of an officer's duties. The defendant argues that the State has failed to prove the element of physical obstruction and in his reply brief attempts to show the State distorted the evidence. Evidence was introduced from which the trial court could have determined that the defendant physically obstructed the officers in the performance of their duties. There was testimony that the defendant was in front of the officers as they were carrying the boy up the stairs, and obstruction

can occur whether a flight of stairs is wide or narrow. There was also evidence that the defendant bumped into several of the officers, and one officer said the defendant continued bumping into him as they went towards the police room. This testimony was sufficient to establish that the defendant did obstruct the officers and that the obstruction was intentional. The fact that the defendant denied having intentionally bumped into the officers does not mean that the State failed to prove intent. It simply means that the court was faced with the choice of assessing the credibility of the witnesses, and apparently chose to believe those of the State. We cannot say that the trial court abused its discretion by believing the police officers and not the defendant.

The defendant argues that the court may have relied on the statements of Officer Erth to the effect that the defendant's acts were intentional and were aimed at separating the officers from their hold on the boy's limbs. The defendant urges that these were opinions on an ultimate issue and the objections made to the statements should have been sustained. Since this was a bench trial there was not the danger of misleading a jury by an improper ruling, and if there was any error in overruling the objections the error was harmless, because there was sufficient evidence in the record for the trial court to hold that the defendant physically obstructed the officers in the performance of their duties.

The defendant also argues that the State failed to prove that the arrest of the 10-year old boy, which prompted defendant's actions, was authorized. He bases his argument on the language in the statute which indicates that the penalty in question is the interference of a peace officer's

"authorized act within his official capacity." Defendant argues that unless the State can show that the arrest of the 10-year old boy was authorized the defendant was not prohibited from obstructing. We believe that this interpretation of the statute would undermine the very purpose for which it was enacted.

In Landry v. Daley, supra, the court discussed the import of the phrase "authorized act" as used in the statute, and concluded that within the context it meant the "legal or legally effective acts of an officer," which interpretation narrowed the scope of the statute "to include only resistance or obstruction of the legal acts of police and other officers." However, the court also said, "If the act which is resisted or obstructed is the making of an arrest, a private person is not authorized to resist such arrest with force even though he knows the arrest is unlawful." See Ill. Rev. Stat. 1967, ch. 38, § 7-7. It would seem inconsistent to hold that a law which restrains one from resisting even unlawful arrests allows others to obstruct the same arrest. See Committee Comments, Smith-Hurd Annotated Statutes, chapter 38, section 31-1.

In the case before us, however, there was evidence to indicate that the arrest of the boy was lawful, and that he had been arrested only after being ejected, then kicking and hitting at the arresting officer. Under these circumstances there is no necessity to decide what would have been the case had the arrest of the boy been unlawful, and specifically whether an unlawful arrest is an "authorized act" within the meaning of section 31-1. The case concerns an obstruction of a lawful arrest, and a lawful arrest must certainly be classified as an "authorized act." People v. Birnbaum, 41 Ill. 2d 426, 428.

Finally, the defendant argues that the arrest was made because the officers were irritated at defendant's continued insistence upon seeing the boy in the police room; that such a basis of arrest was unconstitutional in that it violated the guarantees of free speech. While we agree that under ordinary circumstances it would be unconstitutional to convict one for arguing with a police officer over the validity of an arrest, the defendant fails to show that such was the case in his own conviction. No rule of law stipulates that one must be arrested within a certain number of seconds after an offense has been committed. There was apparently a short period of time between the commission of the offense charged and the arrest. While there was some testimony indicating that there were conversations between the defendant and the officers there is no reason to assume that defendant was arrested for anything other than obstructing the performance of the police officers' duties.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

110 I.A. 2nd 450

No. 52726

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
BONNIE MAE WELSCH, Defendant-Appellant.	)	HON. JACQUES F. HEILINGOETTER PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant was indicted on two counts--both for murder committed on April 14, 1967. Count One charged that she intentionally and knowingly killed Frank L. Robbins with a knife, without lawful justification, in violation of Chapter 38, §9-1, of the Illinois Revised Statutes (1965). Count Two charged that without justification she stabbed and killed Robbins with a knife, knowing that stabbing with a knife created a strong probability of death or great bodily harm, in violation of Chapter 38, §9-1 (a-2). In a jury trial defendant was found guilty of the lesser included offense of voluntary manslaughter and sentenced to serve a term of three to sixteen years in the Illinois State Reformatory for Women. She contends on appeal that the killing was done in self-defense and that the sentence imposed should be reduced. The facts follow.

Beulah Hopgood testified that she was the mother of the victim Frank Robbins and that her son and the defendant were engaged to be married. At about 2:00 a.m. on April 14, 1967 she received a telephone call from defendant who asked whether she had seen Frank and said that he had walked out on her. Mrs. Hopgood told her not to worry, that Frank would be back, but the defendant replied, "No, he won't, Mom. He can't

ever come back in my apartment again. He has done me wrong ....No one else can take him from me....All the women want Frank, but they're not agoing to get him. I'll kill him before anyone can have him." Defendant hung up and Mrs. Hopgood called her back at 2:15 a.m. At that time the defendant said, "I killed Frank....Mom, no one ever does hit me and get by with it. I'll kill them before I let them run over me." While Mrs. Hopgood was talking to the defendant over the telephone, she heard the police arrive at defendant's apartment and one of the policemen talked to her on the phone.

Policeman Anthony Agnoli testified that he arrived at 5841 North Damen Avenue, Chicago, at 2:20 a.m. on April 14, 1967 and went up to the defendant's apartment. He was admitted by defendant and saw the deceased sitting in a chair with a steak knife imbedded in his chest. Defendant told Agnoli that she had an argument with Robbins, that he slapped her around and she stabbed him.

Detective Roy Rushing testified that he arrived at the scene at about 2:30 a.m. He heard defendant say that she stabbed Robbins because he struck her and that no man strikes her and gets away with it. He advised defendant of her constitutional rights, but she continued talking. She told him that she and Robbins had been living together for nine months, that they had been out drinking and that when they arrived at her building, she challenged him to a foot race up the stairs. When she got to the second floor landing, she discovered that Robbins was not following her and she went back to look for him. When she returned to her apartment, Robbins was there and let her in. They had an argument. Robbins struck her on the neck

and she said, "No man can hit me and get away with it, and I picked up a knife in the kitchen and I stabbed him with it." Rushing further testified that he observed no marks on the defendant and that he observed "defense wounds" on the arms of the victim.

Defendant testified that she and Robbins lived together in her apartment, that Robbins was married to another woman but was getting a divorce and was going to marry her. On April 13, 1967 they went to a tavern where they each had five drinks. At the tavern she told Robbins she did not think she would marry him. They left there at 1:00 a.m. and went to her apartment building. They decided to race up the back stairs, but when defendant reached the second floor landing, she realized that Robbins was not following her. Since he had the keys, she returned to the tavern and made a telephone call to her apartment, but got no answer. She returned to the building, found Robbins and went to her apartment with him. Once inside the apartment, she told him she wanted him to move out. An argument ensued and Robbins hit her on the neck and side of her face. She testified she was dazed and "then the next thing I remember I hit him, Frank, with the knife." She then called the police and Mrs. Hopgood, Robbins' mother.

Defendant's daughter was called as a witness for the defense and testified she saw bruises on the side of her mother's neck at about 4:00 or 5:00 a.m. on the day in question.

Defendant's first contention is that the killing was done in self-defense. She argues that "it is not necessary to a plea of self-defense that the accused should have been in actual danger, but that it is sufficient that

the accused reasonably believe that he was in danger of losing his life or suffering great bodily harm." (Citing People v. Davis, 300 Ill. 226, 133 N.E. 320.) The Criminal Code provides that the use of force in self-defense which is likely or intended to cause death or great bodily harm is justified only when the person using said force reasonably believes its use is necessary to prevent great bodily harm or imminent death to himself. Ill. Rev. Stat., ch. 38, §7-1 (1967); People v. Williams, 95 Ill. App. 2d 421, 237 N.E.2d 740. The right of self-defense does not permit killing in retaliation or revenge. People v. Thornton, 26 Ill. 2d 218, 186 N.E.2d 239; People v. Dillon, 24 Ill. 2d 122, 180 N.E.2d 503; People v. Peery, 81 Ill. App. 2d 372, 225 N.E.2d 730.

In the instant case even taking defendant's testimony as true, there is nothing to indicate she believed that she was in danger of losing her life or suffering great bodily harm. Her conversation with Robbins' mother and with the police prove she stabbed Robbins not out of fear for her own safety, but in reprisal for the wrong she thought he had done her. The evidence establishes her guilt beyond a reasonable doubt.

Defendant's second contention is that the sentence imposed was too severe and should be reduced. She argues that she had no prior record of crime and was gainfully employed. The imposition of sentence is a matter of judicial discretion and in the absence of manifest abuse, a sentence imposed by the trial court will not be altered. People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527; People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673; People v. Valentine, 60 Ill. App. 2d 339,

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208 N.E.2d 595. The sentence of three to sixteen years is within the limits prescribed by the legislature, and the relatively small minimum sentence gives the parole authorities ample latitude within which to exercise their discretion with respect to rehabilitation.

[1] We find no reversible error and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

SULLIVAN, P.J. and DEMPSEY, J. concur.

110 I.A. 2nd 451

52909

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit
v.	)	Court of Cook County.
ERNEST DENSON, JR., Defendant-Appellant.	)	James D. Crosson, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant, Ernest Denson, Jr., was indicted for an armed robbery of a Chicago Transit Authority bus driver committed before dawn on June 22, 1967. He pleaded not guilty, waived his right to a jury trial, was found guilty and sentenced to the penitentiary for a term of not less than five nor more than twelve years.

The only issue raised on appeal is the propriety of the court's acceptance of the waiver of a jury trial. The defendant contends that the court erred in accepting the waiver because it was not understandingly made and because there was no explanation in open court of the meaning of a jury and a non-jury trial.

At the very outset of the defendant's trial, the following colloquy occurred:

Defendant's Attorney: "This will be a bench trial."

The Court: "Mr. Denson, the Court has been advised by your counsel that you desire to waive a jury and have your case tried by the Court.

"You understand that you have the right to submit your cause to a jury and have them decide it?"

The Defendant: "Yes, sir."

The Court: "Knowing that, do you persist in having your case tried by the Court, and waive the jury?"

The Defendant: "Yes, sir."

The Court: "Will you indicate your intention by signing a jury waiver?"

Assistant State's Attorney: "Let the record reflect the defendant has signed the jury waiver and it has been presented to the Court."

Every person accused of an offense shall have the right to a trial by jury unless understandingly waived by him in open court. Ill.Rev.Stat., 1967, ch. 38, sec. 103-6. The trial court has the duty to see that an election to waive a jury is expressly and understandingly made. People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631 (1964); People v. Palmer, 27 Ill.2d 311, 189 N.E.2d 265 (1963).

In this case, the defendant's counsel initiated the waiver by informing the court that there would be a bench trial. Presumably the attorney had discussed the waiver with his client and informed him of his rights. See People v. Catalano, 29 Ill.2d 197, 193 N.E.2d 797 (1963). In addition, after the announcement of the waiver by counsel, the court advised the defendant of his right to a trial by jury. The court then asked him whether he knew of his right to be tried by a jury instead of by the court and when satisfied that he did, had him sign a jury waiver. The defendant at all times was responsive in his answers and there was nothing to suggest that he did not hear or understand what was being said to him. Contrast People v. Bell, 104 Ill.App.2d 479, 244 N.E.2d 321 (1968).

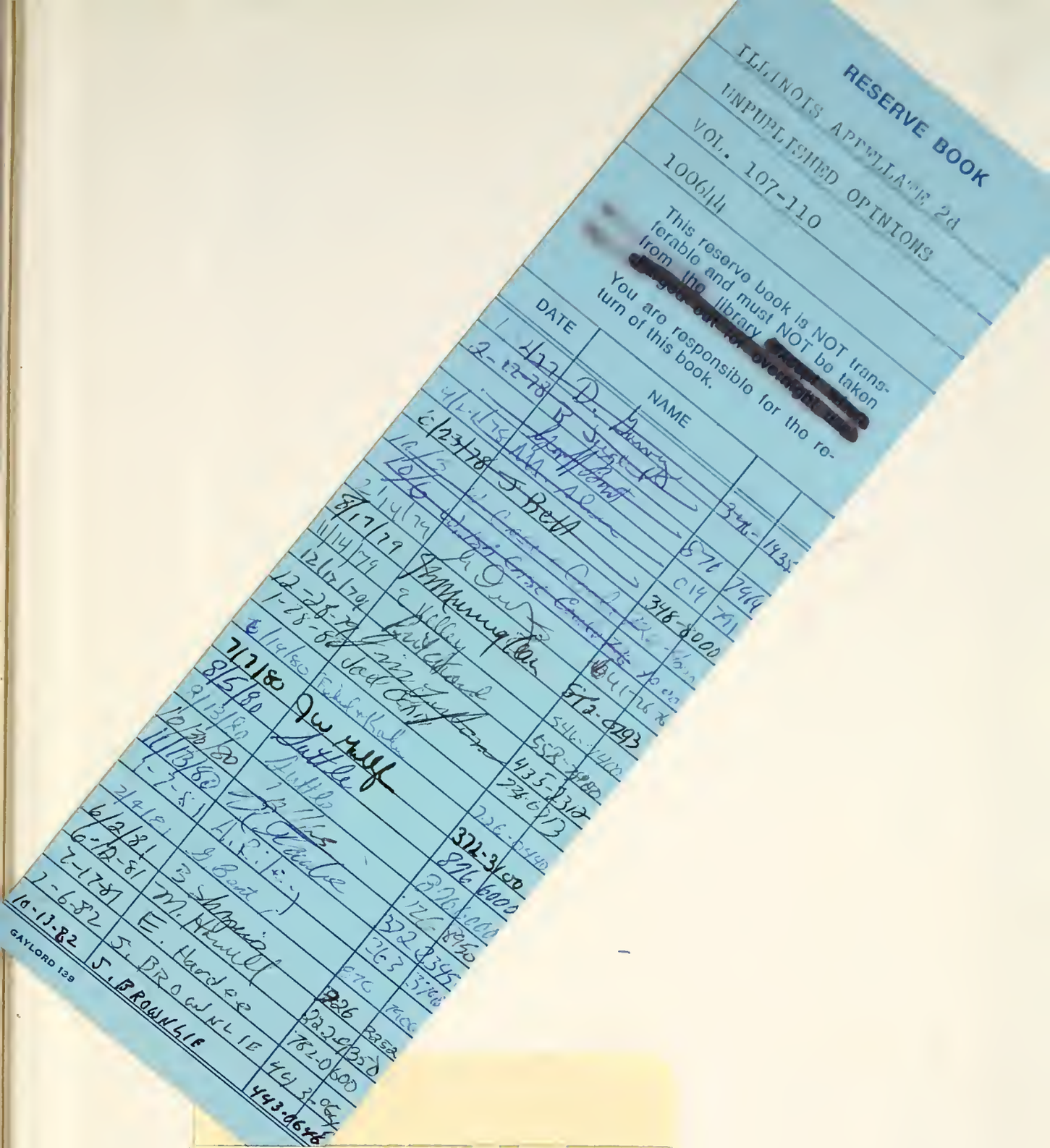
[1] Like the trial court, we are satisfied that the defendant understood what he was doing. He spoke English, was a high school

graduate, had served in the United States Army for four years and was employed as a clerk-typist. He had previous experience as a defendant, including a conviction in 1955 for robbery in a non-jury trial, and convictions on pleas of guilty to two charges of armed robbery in 1962. In the trial of the instant case, he demonstrated his acquaintance with defense privileges by requesting the appointment of an attorney from a list of attorneys furnished by the Chicago Bar Association to replace the Public Defender. All of these factors indicate that the defendant's right to a jury trial was understandingly waived and that the court's explanation of that right was adequate. People v. Nelson, 17 Ill.2d 509, 162 N.E.2d 390 (1959).

The judgment is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.



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